

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NTN-BOWER CORPORATION,)	
)	
and)	Case 10-CA-38816
)	
INTERNATIONAL UNION, UNITED)	
AUTOMOBILE, AEROSPACE, &)	
AGRICULTURAL IMPLEMENT)	
WORKERS OF AMERICA,)	
AFL-CIO CLC.)	

**BRIEF IN SUPPORT
OF RESPONDENT'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

NTN-Bower Corporation,
Respondent.

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TABLE OF CONTENTS

<u>Statement of the Case</u>	1
<u>Specification of the Questions</u>	3
<u>Argument</u>	4
I. <u>The Administrative Law Judge erroneously rejected and refused to consider substantial evidence that employee disaffection for the Union occurred prior to and independent of the unfair labor practices found in 356 NLRB No. 141. (Exceptions 1, 14, 16, 17, 18, 19, 20, 23, 25, 28, 29)</u>	4
A. <u>The cause of disaffection was the conduct of the strikers.</u> . .	11
II. <u>Application of the <i>Master Slack</i> factors does not establish a causal nexus between the unfair labor practice charges cited in 356 NLRB No. 141 and the disaffection petition. (Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 23, 25, 27, 31)</u>	33
III. <u>The Union is not entitled access to the plant. (Exceptions 21, 22, 24, 30)</u>	37
<u>Conclusion</u>	38

TABLE OF AUTHORITIES

Cases

<i>Am. Directional Boring, Inc.</i> , 14-CA-27386, JD-35-07, 2007 WL 2430006, *n.11 (N.L.R.B. Div. of Judges Aug. 23, 2007)	32
<i>BPH & Company, Inc. V. NLRB</i> , 333 F.3d 213 (D.C. Cir. 2003)	5
<i>Bridgestone/Firestone, Inc.</i> , 335 NLRB 941 (2001)	7, 9
<i>Champion Enterprises, Inc.</i> , 350 NLRB 788, 791-792 (2007)	33
<i>Comau, Inc.</i> , 357 NLRB No. 185 (2012)	9, 10, 33, 37
<i>J.C. Produce, Inc.</i> , 2005 WL 1313522 (May 9, 2005)	8, 9
<i>Lexus of Concord</i> , 343 NLRB 851 (2004)	6, 7, 9, 38
<i>Master Slack Corp.</i> , 271 NLRB 78 (1984)	2, 4-6, 9, 32, 33, 36
<i>NTN-Bower Corporation</i> , 356 NLRB No. 141 (April 20, 2011)	3
<i>Renal Care of Buffalo, Inc.</i> , 347 NLRB 1284 (2006)	8, 36
<i>Roosevelt Mem'l Med. Ctr.</i> , 348 NLRB 1016 (2006)	32

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The Respondent, NTN-Bower Corporation, through its attorneys, Roy G. Davis, Keith J. Braskich, and Richard A. Russo of Davis & Campbell L.L.C., files the following points and authorities in support of its exceptions to the decision of the Administrative Law Judge dated February 15, 2012.¹

Statement of the Case

The Company manufactures cylindrical and tapered roller bearings² which are incorporated into large trucks, farm and industrial equipment. The Company has two

¹ The Decision of the Administrative Law Judge is cited herein as “Decision __” with reference to the page number. The transcript of the hearing is cited “Tr. __” with reference to the page number where the cited material may be found. General Counsel’s Exhibits are cited “G.C. __”; the Charging Party’s exhibits “C.P. __”; the Respondent’s Exhibits “R. __”; and the Joint Exhibits “J. __” with reference to the exhibit number assigned at hearing.

² The Administrative Law Judge mistakenly refers to them as “ball bearings”. Decision p. 2, line 38.

plants. One is in Macomb, Illinois and the other, the subject of this case, is in Hamilton, Alabama. (Tr. 107-108) The production employees of the Hamilton plant were represented by the Union.

On December 17, 2010, bargaining unit employee Ginger Estes faxed to Stacy Sinele, the Company's General Manager of Human Resources, eleven pages, each page bearing the notation "NTN Bower Employees: We do not want the Union as our Representative" accompanied by bargaining unit employee signatures (hereinafter "the Petition"). (R. 3; Tr. 152-153) The Administrative Law Judge correctly found "that the petition submitted to Sinele on December 17 was signed by a majority of the employees in the unit". (Decision p. 10, line 3-4)

On December 31, 2010, Sinele sent Harvey Durham, Servicing Representative of UAW Region 8, a letter stating:

The bargaining unit employees of the Hamilton plant have provided us with a petition signed by a majority stating that they no longer want to be represented by the Union. We have independently verified the signatures as well as the number of signers.

Based upon the foregoing, the Company withdraws recognition from the union effective January 1, 2011.

(J. 2; Tr. 161-162) The Administrative Law Judge concluded "that the withdrawal of recognition was lawful unless the unremedied unfair labor practices from the prior case are found to have tainted the loss of majority support under *Master Slack*, supra,

and its progeny”. (Decision p. 10, line 15-18)

The “prior case” referred to by the Administrative Law Judge is *NTN-Bower Corporation*, 356 NLRB No. 141 (April 20, 2011). With respect to the unfair labor practices found in that case, the Administrative Law Judge correctly concluded:

The unfair labor practices followed an economic strike engaged in by unit employees from July 2007 to July 2008.

(Decision p. 2, line 11-12)

Specification of the Questions

1. Whether the Administrative Law Judge erred when he concluded that, by withdrawing recognition from the Union, the Company has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. (Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 25, 26, 27, 28, 29, 31)

2. Whether the Administrative Law Judge erred when he concluded that, by denying the Union access to its facility for the purpose of representing unit employees since January 27, 2011, the Company has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. (Exceptions 21, 22, 24, 30)

Argument

- I. The Administrative Law Judge erroneously rejected and refused to consider substantial evidence that employee disaffection for the Union occurred prior to and independent of the unfair labor practices found in 356 NLRB No. 141. (Exceptions 1, 14, 16, 17, 18, 19, 20, 23, 25, 28, 29)

The Administrative Law Judge held that the unfair labor practices found by the Board in 356 NLRB No. 141 so taint the disaffection petition that the Company cannot rely upon it to support withdrawal of recognition. In this regard, the Board has held:

However, the unfair labor practices must be of such a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. **Stated differently, the unfair labor practices must have caused the employee disaffection here or at least had a "meaningful impact" in bringing about that disaffection.** In short, there must be a causal relationship between the unlawful conduct and the petition

The General Counsel contends, in effect, that the causal relationship is demonstrated as a matter of law by virtue of the continued impact of the unremedied unfair labor practices in light of the background of flagrant and serious unfair labor practices. That argument begs the question.

Master Slack Corp., 271 NLRB 78 (1984) at 84 (internal citations omitted and emphasis added). Thus, the burden is on the General Counsel to establish a causal connection between the unfair labor practices and employee disaffection with the Union. As *Master Slack* states, it is insufficient simply to argue that the unfair labor

practices are “unremedied” and “flagrant and serious”. Rather, “substantial evidence” of a causal link must be established. *BPH & Company, Inc. V. NLRB*, 333 F.3d 213 (D.C. Cir. 2003).

In analyzing the causal connection between an employer’s unfair labor practices and employee disaffection for a union under *Master Slack*, the Board utilizes an objective standard allowing the General Counsel to use the nature of the employer’s conduct constituting an unfair labor practice as evidence supporting the cause of the disaffection. However, the Board’s use of an objective standard, in essence to support a prima facie case, does not preclude an employer from presenting employee testimony to show that pre-existing or independent intervening events, not the employer’s unfair labor practices, actually caused union disaffection among employees. In *Master Slack* the Board adopted the recommended decision and order of the administrative law judge dismissing a complaint alleging that withdrawal of recognition was unlawful. The administrative law judge allowed twenty of ninety petitioners to testify regarding the reason for their signing a decertification petition. The Board found no basis to disturb the administrative law judge’s reliance on the unambiguous testimony of the petition signers regarding their motivation for doing so.

Typical of the responses of the employees regarding their reasons for

signing the petition is that of Barbara Griffin, hired in 1964, who testified that although she was aware of the unfair labor practice issues, they had nothing to do with her signing the petition. "I signed it because I didn't want the Union. I didn't feel the plant needed a union."

Master Slack, at 85. The Board has consistently allowed an employer to establish by employee testimony that independent or intervening events, and not the employer's unfair labor practices, caused employee disaffection for the union.

In *Lexus of Concord*, 343 NLRB 851 (2004) the Board disagreed with the administrative law judge's finding that the employer unlawfully withdrew recognition. While agreeing that the employer violated Sections 8(a)(5) and (1) by unilaterally transferring an employee and by failing to provide union requested information, the Board found employee testimony regarding union disaffection arising prior to and independent of the employer's unfair labor practices to be relevant and determinative of the causal connection inquiry:

The Respondent introduced undisputed evidence showing that the unit employees's disaffection from the Union arose well before Burman's transfer. Specifically, Technician Scott Hudson testified that the employees' discontent with the Union had been growing for a few months. Technician Bob Stevens also testified that multiple discussions concerning dissatisfaction with the Union occurred among unit employees as early as December 2000, and continuing into March 2001. This judge, however, erroneously rejected this evidence because it predated the Respondent's return to the bargaining table. The issue here is whether the Respondent's placement of Burman in the installer position without bargaining with the Union caused employee disaffection. **Hence, evidence that employee disaffection arose prior**

to, and independently of, the Respondent's unfair labor practice conduct is relevant to this inquiry, and supports our finding that the placement of Burman in the installer position did not cause the employees' disaffection from the Union.

Lexus of Concord, at 852-853 (emphasis added).

In *Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001) the Board affirmed an administrative law judge's decision that withdrawal of recognition was untainted and lawful despite the employer's violation of Section 8(a)(1) by interrogating an employee about his position regarding the union and threatening the employee with the loss of a raise if the union remained. Two employees testified that they signed the disaffection petition for reasons unrelated to the employer's unfair labor practices.

Furthermore, it is clear that there were other reasons for the employees becoming disaffected with the Union. Kiester testified that the employees' decision to reject the Union was a "long time coming" (Tr. 98), and he told DelBusse he was unhappy with the Union because there was "no union representative and they hadn't had a contract in a long time." (Tr. 48) Indeed, the Union had not negotiated a new contract since the prior CBA expired in May 1995, and a period of almost 3 years had passed without any negotiations towards a new contract. The General Counsel presented no evidence to suggest that DelBusse's or Kiester's poor morale or disaffection regarding the Union was caused by Petros' statements to Sparte, rather than by a failure of the bargaining process. Under the circumstances here, I find that the Respondent's unfair labor practices regarding Sparte did not influence, and did not have a significant tendency to influence, the actions of DelBusse and Kiester with respect to the petition. Therefore, I conclude that the unfair labor practices involving Sparte did not taint the antiunion petition.

Bridgestone/Firestone, at 950.

The Board in *Renal Care of Buffalo, Inc.*, 347 NLRB 1284 (2006) found that unfair labor practices did not taint a disaffection petition which resulted in the withdrawal of recognition. Two employees out of fifteen who signed the petition were allowed to testify concerning their reasons for doing so.

For example, the employees who signed the withdrawal petition had no involvement in the drafting of the request for information nor did they know the type of information that was requested concerning specific bargaining proposals that had been discussed during negotiations. Indeed, the two employees who testified about the withdrawal petition both stated that they were not aware of any issues or discussions surrounding requests for information and there [sic] reason for signing the petition was unrelated to any unfair labor practices that the Respondent might have committed. **Rather, it is apparent from their testimony that it was the Union's conduct that caused employee disaffection and prompted the employees' signatures on the withdrawal petition.**

Renal Care, at 1297 (emphasis added).

The General Counsel has issued an advice memorandum confirming that disaffection which pre-dates unfair labor practices or which is attributable to other causes is relevant and can be dispositive of a charge alleging that withdrawal of recognition is unlawful. In *J.C. Produce, Inc.*, 2005 WL 1313522 (May 9, 2005) the General Counsel determined that 8(a)(3) charges alleging the unlawful termination of former strikers did not taint a disaffection petition signed by replacement employees.

Rather, a number of petition signers stated that their disaffection with the Union pre-dated the strike or was caused by the Union's conduct during the labor dispute, including strikers' misconduct. Indeed, there is no evidence that employees attributed the terminations to retaliatory animus rather than the strike misconduct. **Although the Board does not require that a causal nexus be established by inquiries into the employees' subjective state of mind, the Board will consider evidence that disaffection pre-dated the violations or was attributable to other causes.**

J.C. Produce, at *4 (emphasis added) citing *Lexus of Concord*,

Bridgestone/Firestone and *Master Slack*.

To justify his rejection of the Company's evidence, the Administrative Law Judge cites the Board's recent decision in *Comau, Inc.*, 357 NRLB No. 185 (2012). The Administrative Law Judge interprets *Comau* as a directive to ignore actual evidence relating to the source of disaffection, and instead rely solely upon an administrative presumption of taint when there are unremedied unfair labor practices. To the contrary, the Board in *Comau* went to great lengths to identify *specific evidence establishing the causal link* between the unfair labor practices and the disaffection. Significantly, in *Comau* testimonial evidence established that the employees were aware of the unfair labor practices, and that the unfair labor practices were a cause of contemporaneous and subsequent disaffection.

In this regard, the employer in *Comau* announced in December 2008 an unlawful unilateral implementation of health insurance changes, resulting in

increased employee premium costs, effective March 1, 2009. *Testimonial evidence* established that in January 2009, employees were *in fact* expressing dissatisfaction with the union's inability to prevent the premium increases, and that 84 signatures on the disaffection petition were thereafter obtained in February 2009. The Board further found that an additional 34 signatures (resulting in a majority at that point) were obtained in the ten-day period following the March 1 implementation. The Board specifically noted: (1) that "this *sequence of events supports the inference* that the unlawful implementation was a substantial factor motivating employees to sign the petition after March 1;" and (2) "the *evidence establishes* that the decertification effort *was driven* by the Respondent's announcement in December 2008 that it intended to implement the new healthcare plan." Significant also is the Board's noting that "*no other reason has been offered to explain* the sudden resurgence of interest in the decertification petition."

Unlike *Comau*, in the present case there is absolutely no evidence in the record that the employees signing the disaffection petition *were even aware* of the unfair labor practices. In addition, whereas in *Comau* the evidence established disaffection *contemporaneous with and subsequent to* the unfair labor practices, the only evidence in this case is that the employee disaffection arose *prior to and independent of* the commission of the unfair labor practices. To this point, the

Administrative Law Judge made specific findings of fact that the unfair labor practices followed the strike (Decision p. 2, line 11-12) and that each of the twelve employees who testified at the hearing “testified that they did not want the Union to represent them because of the way they were treated during the strike while crossing the Union’s picket line.” (Decision p. 7, lines 10-13)

In short, employee testimony regarding the motivation for signing the petition was relevant, admissible, persuasive and the only actual evidence regarding the cause of disaffection in this case. The Administrative Law Judge erred by rejecting and refusing to consider the Company’s compelling evidence that conduct of the Union, occurring prior to and independent of the unfair labor practices found in 356 NLRB No. 141, caused employee disaffection which resulted in a majority of the unit signing the petition.³

A. The cause of disaffection was the conduct of the strikers.

In the instant case, there is abundant evidence of Union inspired animus toward the permanent replacements and line crossers who constitute virtually all of the signers of the disaffection petition. The administrative law judge decision in 356

³ In addition to the twelve members of the bargaining unit that were permitted to testify about their reason for signing the petition, the Company proffered the testimony of the remaining signers. The Administrative Law Judge erroneously excluded their testimony. (Decision p. 7, line 29-24)

NLRB No. 141, which was adopted by the Board, holds that the Company's refusal to turn over the names and addresses of the permanent replacements to the Union during the strike was lawful because the Company reasonably feared doing so would constitute a clear and present danger to them. The details of the picket line conduct which supported the Board's decision are appalling. Moreover, the Company's evidence conclusively demonstrates that the picket line conduct is the cause of disaffection and that it occurred substantially before and independent of the unfair labor practices discussed in 356 NLRB No. 141.

Brandi Parker

Brandi Parker, who is an employee of Respondent in assembly and inspection, testified that she started working at Respondent's Hamilton plant in September 2007 when there was a strike in progress; that she experienced difficulties in crossing the picket line in that comments were made to her of a sexual nature, her picture was taken, her vehicle was surrounded, and she believed that her license plate number was recorded; that on occasion when she was leaving the plant at 11 p.m. she saw pickets hit peoples' car windows with sticks; that on one occasion, a couple of months after she started working at Respondent, she was followed for a while after she left the plant; that she did not go in the direction of her residence since she did not want the person following her to know where she lived; that at some point she turned left and the individual following her turned right; that she then went to pick up her children; that on the October 30 (presumably 2007) she had two flat tires on the vehicle she was driving; that nails had to be removed and the tires plugged; that the following day while she was driving to work the lug nuts on a wheel came loose, and the wheel fell off; that she filed a police report; that "I went and got a pistol license and I went and bought a pistol" (Tr. 636) because she is a single mother

and she was afraid; that a female picketer approached her in a grocery store, called her a “scab” (Tr. 648), and told her that she was taking a job and she would not have her job much longer; that she told the security guards at Respondent’s facility about the two flat tires, the loose lug nuts, and being followed, and she gave a written statement; that she gave Respondent the receipt for plugging the two flats; and that she did not discuss these matters with a supervisor or manager at Respondent.

(356 NLRB No. 141, p. 12-13)

Aaron Rea

Aaron Rea testified that he has worked for Respondent since August 2007; that he experienced trouble in getting across the picket line in that people hollered and would not let him through; that during that time he crossed the picket line he had nails on his home driveway between 15 to 20 times; that on October 3, 2007 he had one tire on each of three vehicles in his yard slashed; that he lives with his mother and grandmother, and one of the vehicles belonged to his grandmother and one belonged to his mother; that since the damage was in the sidewall, three new tires had to be purchased; that diesel fuel and sugar were found in his gas tank and he had to replace his engine, costing about \$1,500.00; and that 4 months before he testified at the trial herein on June 11, 2009, Bexar Robinson, who is a member of the Union who went out on strike, approached him at a gas station near his home. Rea testified as follows regarding what Robinson, who he had known for a long time, then said:

He [Robinson], what is was, he was telling me, that my grandma’s stuff; he was sorry. So I told him, it was sorry for whoever cut my tires. He said, you’re lucky that’s all I did. I was going to kill you. That’s exact words out of his mouth and I got two witnesses [(Bob Marcus and Sidney Gurst)] that own’s [sic] the store. They’re not here right now, but they can come, if needed [Tr. 662]

(Id., p. 13)

Elicio Jimenez

Elicio Jimenez testified that he started working for Respondent as a material handler during the involved strike; that he experienced trouble crossing the picket line in that collectively picketers would call him names, tell him he stole their job, tell him to go back to his country, motion with a slashing hand movement across the throat, hit his car windshield with a picket sign but did not damage it, and followed him three times for a few miles when he left Respondent's facility; that one of the reflectors at the end of his driveway was missing; that he told security one time about the picketers following him when he left the Respondent's facility; and that he thought about quitting the job but he did not.

(Id., p. 13-14)

David Benton

David Benton testified that he started working as a replacement worker for the Respondent right after the strike started in 2007; that he works in heat treat where the parts are hardened; that he had trouble in crossing the picket line in that, collectively, the picketers temporarily blocked his car, and threatened him; that on one occasion (when his family was in the vehicle) a picketer, described by Benton only as Nathan, invited him to get out of his vehicle, he refused, and the picketer said "I'll come to your house and whoop you ass then" (Tr. 703); that he told the picketer "you don't know where I live" (Tr. 703) and the picketer said "Well, I'll find out" (Tr. 703); that Perry, in effect, told the picketer to stop what he was doing; that he told the security force about the threat to come to his home; that a picketer, who has been called back to work and who has since apologized, had a sign behind him and the picketer hit the hood of his vehicle; that the vehicle was not damaged; that two or three times in a three-week period when he got up in the morning after he came home from work he had a flat tire; that he could not prove the nails were from NTN and he has had his own flats; that the nails had a square 1 inch by 1 inch metal washer fixed (attached between a collar and the head) at the head like Respondent's Exhibit 36, which he had seen in Respondent's

plant; and that he reported the nails in his tires to the security guards.

(Id., p. 14)

Shanta Jackson

Shanta Jackson, who works in assembly and inspection assembling bearings at Respondent's Hamilton plant, testified that when she went to work at Respondent's Hamilton plant in August 2007 there was a strike in progress; that she had to cross the picket line and there was name calling, her vehicle hood was hit by a picketer's fist, chewing tobacco was spit on her vehicle, she had to have one tire plugged when the tire went flat at home, they threatened her that she might be found on the road dead, and they would find out where she lived; and that she did not have any nails in her driveway that she knew about.

On cross-examination Jackson testified that she lives in [redacted], Alabama, which is 35 to 40 miles from Hamilton; that one morning when she woke up she noticed that a tire on her car was flat; that this was the first flat tire she has ever had; that the picketers used a racial slur when she crossed the picket line and on one occasion; that she was also called a "scab".

(Id., p. 17)

Adalberto Corado

Adalberto Corado, who became an employee of Respondent at its Hamilton facility in September 2007 after the involved strike started, testified that he assembles bearings; that a lot of times he had trouble crossing the picket line; that he had to wait to cross the picket line; that one picketer hit his car with a stick denting a panel; that he reported the damage to security, that he was called a "wetback" (Tr. 932) when he crossed the picket line; that "more than twice" (Tr. 933) pickets tried to follow him at the end of his shift; that he lives in [redacted], which is 25 minutes north; that one time he was followed one half the way home; that when he realized he was being followed he turned around and drove

different ways; that on one occasion he found a plastic garbage bag adhered to (melting) his exhaust system; that on one occasion he had a flat tire from a nail; and that he told Franks about the name calling, the damage to his car, the nail, and the muffler.

(Id., p. 17)

Joshua Stephenson

Joshua Stephenson, who started working for Respondent at its Hamilton facility in August 2007 while the strike was in progress, testified that he is a machine operator who grinds bearings and races; that he had problems crossing the picket line in that his vehicle was blocked, his vehicle was damaged when it was struck by a picket sign held by Riner who called him a “SOB” (Tr. 964); that he filed a police report and a report with security regarding the damage; that there were several times that he was cursed and a few times a picketer threatened to “whoop” and “stomp” him if he would get out of his truck (Tr. 964) and that he did not report the cursing and threats to anyone at the plant.

(Id., p. 18)

Larry Taylor

Larry Taylor, who is a roll grinder set up man at Respondent’s Hamilton plant, testified that until a few years ago he was in the Union for 35 years; that he did not guess that he was in the Union because his union dues are not deducted; that he was in the bargaining unit when the strike began and he went out on strike and picketed; that three weeks later he came back to work during the strike; that on three occasions starting in September 2007 he had nails thrown on his driveway; that the first time it was a handful of nails and screws and he turned them into security at the plant; that the second time he found 1.5 inch roofing nails which weighed a total of about 1 pound; that the third time his dog started barking and he saw Riner and Robinson, both of whom are in the Union, in a pickup, throw a total of between one half and a pound of nails in his driveway and on the highway; and that when he crossed the picket line

he was called a “scab” (Tr. 998).

(Id., p. 19)

Anthony McGinnis

Anthony McGinnis, who began working at Respondent’s Hamilton plant on August 27, 2007, testified that he is a machine operation in the OD cups department; that he crossed the picket line to go to work; that on January 17, 2008 he came to work early, at 3 a.m., and as he walked across the parking lot with co-worker Gerry Brown to go into the plant, he heard something hit a vehicle behind him; that the sound was like metal hitting metal; that he turned around but he did not see anything; that Brown noticed something rolling in front of them “and he pointed it out to me and so we walked over to it and picked it up and it was a little metal ball” (Tr. 1007); that Respondent’s Exhibit 34 looks like the one metal ball they found; and that they took the metal ball to security and both he and Brown filled out reports for security.

(Id., p. 19)

Gerald Brown

Gerry Brown, who began his employment with Respondent at its Hamilton plant in August 2007, testified that he runs a cup OD; that on January 17, 2008 he met McGinnis in the parking lot on the way into the plant at 3 a.m.; that as he walked across the parking lot he heard something hit behind him; that they walked another 10 feet and something hit the ground and rolled 20 to 25 feet and hit a curb; that he went and picked up the object; that the object came from the direction of the road, across the fence; that he thought that the object came from the direction of the picketers’ tent; and that he brought the object to security and filled out a report.

(Id., p. 19)

Shanta Christopher

Shanta Christopher, who started working at NTN in July 2007 while the strike was in progress, testified that she crossed the picket line; that when she crossed the picket line she was called names and cursed at; that twice she had nails in her tires; that she discovered one flat in the employee parking lot at Respondent's facility, and the other one in the morning at home; that on December 29, 2007 she discovered when she arrived home from work that the rear window of her vehicle was shattered; and that the vehicle had been sitting in the employee parking lot before that.

(Id., p. 20)

Robbie Cooper

Robbie Cooper, who started working at Respondent's Hamilton plant on October 4, 2007, testified that he had difficulty in crossing the picket line in that at about 11:10 p.m. one night in February 2008, after he left the plant, he discovered he had a 1 inch gash in his steel belted tire tread when he was about 1 mile from the plant and the tire went flat; that there were pickets that day and he had to stop before he crossed the picket line that day; that he did not see anyone gash his tire; and that he had round headed roofing nails in his tires on two occasions, once when he first started and again right before the strike was over.

(Id., p. 20)

Ellis Fikes

Ellis Fikes, who started working at Respondent's Hamilton plant in August 2007, testified that striking employee Randy Bell threatened him; that he was visiting a friend in September or October 2007; that as they were leaving to get something to eat "Bell came over and started threatening me saying he was going to whoop my ass" (Tr. 1062); that Bell "slammed my door and wouldn't let me leave when I tried to leave" (Tr. 1062); that Bell stood between him and his car "[t]hreatening me

and putting his finger in my face” (Tr. 1063); that the threatening was Bell saying “he was going to kick my ass and that I was sorry for taking his job” (Tr. 1063); that this lasted for 10 to 12 minutes; that eventually Bell settled down; and that he got in his car and left.

(Id., p. 20)

The instances set forth above are merely a sampling—and a brief one at that—of the striker conduct toward the permanent replacements and line crossers during the strike. There is much more. As the administrative law judge noted:

[Respondent’s Exhibit 28] contains 1389 Bates numbers (pages) including 38 pages which are an incident report log. The reported incidents include, inter alia, nails on the ground, blocking, picketers picketing without a picket sign, nails in tires, recording tag numbers, video taping, vehicles being hit by picket signs or otherwise damaged, verbal threats, intimidation, trespass, shots fired from passing vehicle, vandalism, blowing a kiss to Security team, fighting, hitting a replacement employee with an umbrella tip, police refusing to cross the picket line to assist, profanity, racial slurs, lugs nuts removed from wheel, threatening calls at home (the person who called is not named), vehicles hitting picketers, mass picketing, Lieutenant King of the Hamilton Police Department refused to cross the picket line to take a report, State police shining spotlight into the eyes of exiting vehicles, making sexual remarks, and harassment.

(Id., p. 21 f.n. 18)

At the May 11 hearing in the instant case, the Company was able to demonstrate through employee testimony that the strikers’ conduct toward the line crossers and the permanent replacements during the strike is the cause of their disaffection and their reason for signing the petition.

Employee Shanta Christopher testified:

Q. Now, recently there was a petition circulated among the employees saying we do not want to be represented by the Union. Were you aware of that?

A. Yes, sir.

Q. Did you sign that petition?

A. Yes, sir.

Q. Ms. Christopher, why did you sign that petition?

A. I didn't want to be represented by the Union.

Q. Why not?

A. They're not helping us, and then the way they treated us on that picket line. I got my window busted out when they was doing the picket, and I can't pay – I don't want to pay dues.

Q. Okay. Tell us about your window.

A. It got bust.

Q. How did it get busted?

A. With some kind of piece of – looked like a bottom of a table leg that was thrown in my back window and busted my back window out.

Q. Where was your car when this happened?

A. In the parking lot of the NTN.

Q. Did you see the object thrown?

A. Yes. I didn't see it thrown, but I saw what it was.

Q. Okay. All right. (Tr. 238-9)

Employee Shanta Jackson testified:

Q. Ms. Jackson, you're aware there was a petition went around among the employees saying we no longer want to be represented by the Union; are you aware of that?

A. Yes.

Q. Did you sign that petition?

A. Yes.

Q. Why did you sign that petition, Ms. Jackson?

A. I didn't want to be represented by the Union.

Q. Why?

A. It was very degrading.

Q. What was degrading?

A. Coming every day, going to work.

Q. When?

A. During the time of the strike?

Q. Yes.

A. They called me racial names.

Q. The N word?

A. Yes.

Q. Anything else?

A. Spit tobacco on my vehicle. My tires, I had to have my tires plugged, nails. It never crossed my mind to even join no union. I don't want to have anything to do with that. (Tr. 244-5)

Employee Adalberto Corado testified:

Q. All right. Now, recently there was a petition circulated at the plant saying we no longer want to be represented by the Union. You're aware of that?

A. Yes.

Q. Did you sign that petition, Mr. Corado?

A. Yes.

Q. Why did you sign it?

A. I don't think it's a good idea, the way they've treated us on the picket line, you know.

Q. Mm-hmm.

A. I don't think we have any reason to be –

Q. How did they treat you on the picket line?

A. They call you a lot of names.

Q. What kind of names?

A. They call me a wet back, anything they wanted, you know.

Q. Anything else?

A. They called me one day Giulio Gabelli Perrone.

Q. Okay. Anything else they did to you on the picket line?

A. Every day, give you a hard time, you know. (Tr. 251 - 2)

Employee Gerald Brown testified:

Q. Now, recently there was a petition circulated among the employees at the plant stating that we no longer want to be represented by the Union; do you recall that?

A. Yes.

Q. Did you sign that petition?

A. Yes.

Q. Why did you sign it?

A. During the last strike –

Q. What do you mean by – I'm sorry, go ahead.

A. While they was on strike – when they was on strike, they was throwing ball bearings at me and a buddy of mine. We come in to work one morning.

Q. Ball bearings?

A. Steel ball bearings.

Q. Tell us what happened.

A. We come in one morning at three o'clock in the morning. We was walking across the parking lot and they was throwing bearings at us.

Q. What's this bearing look like? Can you describe it?

A. It's about the size of a marble, maybe a little bigger, steel, solid steel.

Q. And so where was this bearing coming from?

A. From the road from where their tent was.

Q. Where the strikers' tent was?

A. Yes.

Q. Did it hit you?

A. No, sir.

Q. Did it come close to hitting you?

A. One of them came in front of us. One of them hit a car behind us. I picked that one up and went straight in.

Q. How fast were these bearings traveling? Do you have any idea?

A. They would have hurt if it hit you. (Tr. 235-6)

Employee Elicio Jimenez testified:

Q. Okay. Mr. Jiminez, there was recently a petition circulated at the Company saying we no longer want to be represented by the Union; do you recall that?

- A. Yes, I don't want the union because --
- Q. Well, did you sign that petition?
- A. For the Union?
- Q. Yes.
- A. Yes.
- Q. Why did you sign it, Mr. Jiminez?
- A. I signed it just too much for me, call me too many names.
- Q. Called you names?
- A. Called me names, told me -- I don't know can say --
- Q. Yes, you can say.
- A. Call me stupid Mexican and - - kill me.
- Q. They were going to kill you?
- A. They told me a lot of times.
- Q. Where was this when they told you these things?
- A. I don't remember exactly, this whole time, so I mean --
- Q. Was it when you were crossing the picket line?
- A. The picket line.
- Q. Okay.
- A. And one time, this man come and get a sign and hit the car, two times,

and say please leave my car alone, and security come to me and tell me – side street – go the side to report the police. And I go side and police –first thing ask me, you never – and I – yes, sir, and this is what happened. (Tr. 257-8)

Employee Pablo Machic testified:

Q. Recently there was a petition circulated in the plant saying we no longer want to be represented by the Union. Do you remember that petition?

A. Yes.

Q. Did you sign it, Mr. Machic?

A. Yes.

Q. Why did you sign it?

A. The reason I signed it, because the time I start work, I did not – people there, they work – can I say the words?

Q. Yes, you can say the words.

A. Okay. They said Mexican, wherever we come from, go back, and two times they put nails in my tires, and then all that stuff, so that's what I'm thinking, they're not — (Tr. 263)

Employee James Stokes testified:

Q. Very good. There was recently a petition circulated in the plant saying we no longer want to be represented by the Union. Do you recall that happening?

A. Yes, I do.

Q. Did you sign it, Mr. Stokes?

A. I did.

Q. Why did you sign it?

A. Because I don't want to be represented by anybody that – well, in fact, I could represent myself basically, as an independent bargaining unit, and I don't feel I need to be represented by anybody but me.

Q. So that's why you signed it?

A. Yes. (Tr. 266)

Employee Anthony McGinnis testified:

Q. Now, recently there was a petition circulated at the plant and signed by a number of employees saying we no longer want to be represented by the Union; do you recall that?

A. Yes, I recall that.

Q. Did you sign that petition?

A. Yes, I did.

Q. Why did you sign it, Mr. McGinnis?

A. Well, I just feel like that the Union is not needed inside that plant.

Q. Any other reason you signed it?

A. Well, for the way the Union treated me while they were on strike, coming to and from work.

Q. How did they treat you?

A. Mostly name calling.

Q. What kind of names?

A. Their favorite word was scab.

Q. Anything else?

A. And there was this one incidence that me and a co-worker came in early one morning.

* * * * *

Q. Tell us what happened, Mr. McGinnis.

A. Well, that morning me and a co-worker were walking in to work from the parking lot, and I believe we-sounded like something hitting a vehicle behind us. We turned to look. We didn't see anything, so we continued to walk in, and then we notice something rolling across the front of our path, and we walked up to it and we picked it up, and it's a little metal ball.

Q. How big?

A. About the size of a marble.

Q. What did you do with it?

A. We took it to the security office and we filled out reports.
(Tr.231-235)

Employee Shelby Burks testified:

Q. Recently there was a petition circulated through the plant saying we no longer want to be represented by the Union. Do you recall that?

A. Yes, sir.

Q. Did you sign that petition, Ms. Burks?

A. Yes, sir.

Q. Why did you sign it?

A. Felt like I didn't need the Union anymore. I never have needed it. (Tr. 270)

Employee Terra Thompson testified:

Q. Recently there was a petition circulated at the plant saying we no longer want to be represented by the Union. Do you recall that?

A. Yes.

Q. Did you sign that petition, Ms. Thompson?

A. Yes.

Q. Why did you sign it?

A. Because crossing that line, we had a hard time.

Q. Crossing what –

A. But it was my own personal opinion.

Q. Crossing the picket line?

A. Crossing the picket line.

Q. Why did you have a hard time?

A. It was a lot of encounters that happened.

Q. What kind of encounters? Can you describe them for us?

A. Yeah. Coming across, like I said, it was a lady in front of me, Hispanic lady, and she got called all kind of names, go back to over there where you come from, and then when it came up to my turn, of course, I was called the N word.

Q. Okay.

A. And I was an African, I need to go and get out of here, go back over to Africa where you come from. (Tr. 273-4)

Employee Brian Flugmacher testified:

Q. Mr. Flugmacher, there was recently a petition circulated through the plant saying we no longer want to be represented by the Union. Are you aware of that petition?

A. Yes, sir.

Q. Did you sign it, Mr. Flugmacher?

A. Yes, sir.

Q. Why did you sign it?

A. There were several reasons, but the short point I guess would be – I don't need anybody to represent me, and things that happened on the picket line, the way we were treated and I don't – something that's going to be associated with that type of thing, I don't want no part of it.

Q. What kind of things went on at the picket line?

A. Well, we had been harassed and spit at, nails dropped, been, you know, cars getting hit, fights and, I mean, that's child play. (Tr.

280-1)

Employee Ginger Estes, who circulated the disaffection petition, testified:

Q. All right. There was recently circulated within the plant a petition saying we no longer want to be represented by the Union. Are you aware of that?

A. Yes.

Q. Okay. And did you sign that petition, Ms. Estes?

A. Absolutely. I was the first signature.

Q. Okay. Why did you sign that petition, Ms. Estes?

A. I presented that petition.

Q. Okay.

A. I signed it because I didn't want their representation, and a lot of people felt that way. We discussed it, and we wanted a petition sent out. I had talked with the Labor Board. They basically told me the guidelines, what to do, and I thought with their guidance.

Q. Okay. I would like to focus a little bit on your reason for signing it. I understand that you circulated it, but what caused you to sign it, I guess is the best way to put it?

A. Well, I was dissatisfied with the Union, with what I went through on the picket line.

Q. Can you explain what you went through on the picket line?

A. Yeah. There was cursing, picture taking, following us when we left, just racial slurs, watched plenty of people other than myself – I saw one being – their vehicle being hit with a stick. I saw

them pick on Sonny Cook. I saw a lot of this even before I took the job. I sat for two months at the hotel across to watch my family come in. I had dogs that were killed. I had phone calls made on my answering We had a hard time getting through. There were sexual discrimination. Some of them balled us out of there just to intimidate, and I felt like it was wrong. (Tr. 286-7)

The foregoing is compelling testimony of disaffection occurring substantially prior to and having nothing to do with the unfair labor practices discussed in 356 NLRB No. 141. It was error for the Administrative Law Judge to ignore it.

While the Company could have called every person who signed the disaffection petition had the Administrative Law Judge not rejected its proof, the foregoing testimony was sufficient to make its case. “A party has no obligation to call every witness at its disposal to prove its case.” *Roosevelt Mem’l Med. Ctr.*, 348 NLRB 1016, 1022 (2006); *See also Master Slack Corporation*, 271 NLRB 78 (1984) (finding that testimony of 20 of 90 employees regarding their reason for signing disaffection petition sufficient to support employer’s argument that disaffection was not caused by employer’s actions; *Am. Directional Boring, Inc.*, 14-CA-27386, JD-35-07, 2007 WL 2430006, *n.11 (N.L.R.B. Div. of Judges Aug. 23, 2007) (noting that “[i]n theory, virtually every employee of the Company ... would have been able to provide relevant testimony on the issue. The record was fully developed without the production of any additional testimony.”).

II. Application of the *Master Slack* factors does not establish a causal nexus between the unfair labor practice charges cited in 356 NLRB No. 141 and the disaffection petition. (Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 23, 25, 27, 31)

Even if the Administrative Law Judge properly ignored the Company's evidence, application of the *Master Slack* factors does not establish the requisite nexus and the Administrative Law Judge's analysis in that regard is fatally flawed.

Underlying his analysis is the Administrative Law Judge's assumption that the unit employees who signed the petition knew about the unfair labor practices. There is a dearth of evidence in the record to support that assumption. Neither the General Counsel nor the Union tendered any evidence that the petition signers even knew about the unfair labor practices. Moreover, on their face, the unfair labor practices in this case do not implicate the petition signers in the way the unfair labor practices in *Comau*, for example, impacted the petition signers in that case.

The Administrative Law Judge gives no weight to the fact that all but one of the unfair labor practices in this case occurred between July and November 2008 with the latest occurring in March 2009. The petition was not presented to the Company until December 2010. The Board has routinely found that such a temporal disconnect is insufficient to support a causal nexus. *See, for example, Champion Enterprises, Inc.*, 350 NLRB 788, 791-792 (2007) (finding no causal nexus because five to six

month time span rendered events too remote)

The Administrative Law Judge relies heavily on communications issues to reach his result. But his underlying facts are directly contrary to what is in the record.

For example, he finds:

Ivan Caudle, the Union's recording secretary, testified . . . that up until the withdrawal of recognition, the Respondent continued to deny the union access to bulletin boards in the plant and restricted non-working union representatives access to the plant.

(Decision p. 5, line 19-35) There is no testimony by Caudle of this nature in the transcript of the hearing. Moreover, Caudle did testify that he was in the plant in October 2008 to post membership meeting notices on the three Union bulletin boards which is in direct conflict with Administrative Law Judge's finding. (Tr. 38) He also testified that the Union was invited to State of the Plant meetings with all employees. (Tr. 45)

The Collective Bargaining Agreement in effect prior to the withdrawal of recognition provided:

The Committee Chairperson will be allowed thirty (30) minutes on Company time for discussion with any new employee hired by the Company, to be scheduled during the new employee orientation.

(J. Ex. 1 p. 4) Recording Secretary Caudle testified:

Q. Did the Company tell you you couldn't meet new hires, Mr. Caudle?

A. Not to my knowledge.

(Tr. 302)

There is no evidence in the record whatsoever that the Union has ever sought to reach out to the permanent replacements and line crossers who make up the signers of the petition.⁴ To the contrary, the Union has continued to wage war on them, a war which they are aware of, by seeking their discharge through the wrongful and discriminatory application of the plant rules, including the attendance policy. The Company proffered testimony (Tr. 189) and exhibits (R. Ex. 16-29) to demonstrate that the Union has, since the effective date of the Collective Bargaining Agreement, pursued an unsuccessful strategy for procuring the discharge of the permanent replacements by discriminatory application of the attendance guidelines. The Administrative Law Judge rejected the Company's evidence of the Union's continued antagonism toward the petition signers. (Decision p. 7, f.n. 7; Tr. 196, 200) Instead, he engaged in the erroneous presumption (because there is no evidence) that the Union sought to address the concerns of the permanent replacements and to demonstrate to them the benefits of continued representation.

⁴ For example, there is no evidence that the Union passed out handbills apologizing for the nails in their tires or offering to reimburse them the cost of repairing the damage to their vehicles. Similarly, there is no evidence that the Union put a note on Shanta Christopher's windshield apologizing for the damage or offering to pay for it. There is no evidence of the Union's posting on the bulletin board a disavowal of the racist and sexist epithets of the strikers.

Rather, it is apparent from their testimony that it was the Union's conduct that caused employee disaffection and prompted the employees' signatures on the withdrawal petition.

Renal Care, at 1297. It would have been apparent from the Company's rejected evidence that the Union has nothing but animosity toward the permanent replacements and line crossers who signed the petition.

The Administrative Law Judge finds the unfair labor practices impact employee morale, organizational activities, and membership in the Union. Once again, he relies in large part on the testimony of Ivan Caudle.

The testimony of Ivan Caudle, recording secretary, established the decline in membership and attendance since the strike.

(Decision p. 11, line 12-14) Caudle testified that before the 2007 strike approximately 30-50 members attended Union meetings and "in the last few months" prior to the hearing approximately 12-16 members attend the meetings. (Transcript 44-43) There was no evidence proffered concerning attendance at Union meetings during the 2007-2008 strike, immediately after the strike in 2009, or at any time in 2010. It is simply impossible to conclude from Caudle's testimony that the unfair labor practices contributed to the decline in attendance at Union meetings.

Master Slack requires the finding of substantial evidence of a causal nexus between an employer's unfair labor practices and disaffection toward the union. In

this case, there can be no doubt that the disaffection for the Union was caused by the strikers' conduct toward the majority of bargaining unit members who signed the petition. To the extent the Administrative Law Judge even addresses this point, he dismisses it positing that *Comau* precludes consideration of employee testimony regarding causes arising prior to or independent of the employer's unfair labor practices. Nowhere in *Comau* did the Board even intimate that it intended to overrule more than 25 years of established precedent. Furthermore, with absolutely no evidence that the Union has sought to remedy the conduct giving rise to disaffection, the Administrative Law Judge concludes that the unfair labor practices found in 356 NLRB No. 141 would preclude the Union's efforts in that regard. His conclusion flows from a flawed reading of the record and his rejection of evidence of the Union's true intent with respect to the majority of bargaining unit employees. His decision should be vacated.

III. The Union is not entitled access to the plant. (Exceptions 21, 22, 24, 30)

The foregoing demonstrates that the Company lawfully withdrew recognition from the Union effective January 1, 2011. Therefore, the Union is not entitled to access to the plant for purposes of collective bargaining because it is no longer the representative of the employees.


Conclusion

Just as important as the Union's right to collectively bargain with the Company is the employees' Section 7 right to rid themselves of a representative that has shown them nothing but contempt. Similarly, an employer has an obligation to decline continued recognition of a union where it has clear and overwhelming objective evidence that the union has lost majority support.

Pretending that the unfair labor practices found in 356 NLRB No. 141 caused the disaffection which resulted in the petition presented by the Company is an outrage. "[E]vidence that employee disaffection arose prior to, and independently of the Respondent's unfair labor practice conduct is relevant to this inquiry." *Lexus of Concord* at 853. That evidence, fairly considered, supports the conclusion that the conduct of the Union and its supporters is the only source of disaffection.

NTN-Bower Corporation

By: _____


One of Its Attorneys

March 5, 2012

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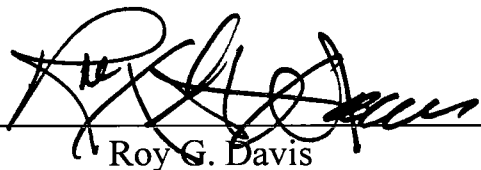
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Counsel of record for the Respondent certifies that he caused a true and correct copy of the foregoing Respondent's Brief in Support of Exceptions to the Decision of the Administrative Law Judge to be served upon the following by placing the same with Federal Express for overnight delivery, all expenses fully prepaid, on March 5, 2012 at Peoria, Illinois in envelopes addressed as follows:

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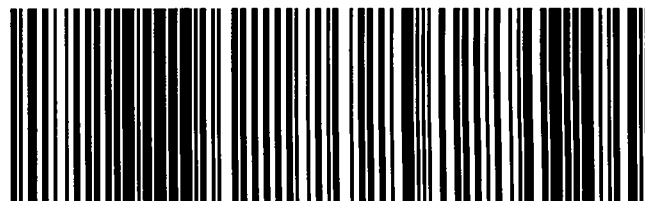
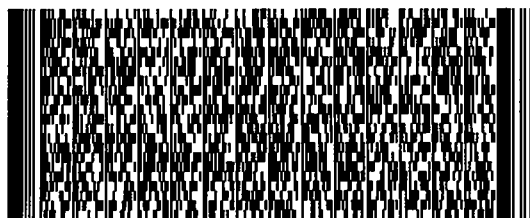
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